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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

ELF-MAN, LLC,

Plaintiff,

vs.

RYAN LAMBERSON,

Defendant.

No. 2:13-CV-00395-TOR

DECLARATION OF J.
CHRISTOPHER LYNCH IN
SUPPORT OF DEFENDANT'S
MOTION TO COMPEL

Hearing: July 14, 2014

Time: 6:30 p.m.

Without Oral Argument

I, J. Christopher Lynch, declare as follows:

1. I am over 18 years of age and am competent to testify. I make this declaration based on my own personal knowledge. I am one of the attorneys for Defendant, Ryan Lamberson (hereinafter, "Mr. Lamberson").

DECLARATION OF
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1 2. I certify that I have attempted in good faith to obtain the discovery
2 sought prior to bringing this Motion to Compel. I have spoken with counsel for
3 plaintiff Carl Crowell over the telephone and I have written multiple emails to Mr.
4 Crowell and Ms. VanderMay demanding the requested documents, all to no avail.
5 Plaintiff has shown no willingness to provide the documents, to debate the claimed
6 privilege, or even to provide the required privilege log under Fed. R. Civ. P.
7 26(b)(5)(A). Today, June 13, 2014, I spoke with attorney David Lowe of Seattle
8 who told me he may become attorney for Elf-Man, LLC in this case. I informed
9 him of the outstanding discovery and I was not informed that he had any authority
10 to provide the documents or privilege logs.

11 3. Attached as Exhibit A is a true and correct copy of the Second Set of
12 Requests for Production and the Responses Thereto, including a copy of the
13 envelope in which they were received. The Requests were served on April 22,
14 2014. The responses were received on May 30, 2014, as seen by the copy received
15 date stamp from my firm. The responses were postmarked May 28, 2014, as seen
16 by the postmark on the envelope.

17 4. On April 21, 2014, I wrote to counsel for plaintiff and informed her
18 that we had discovered the Gerephil Molina presentation about APMC (“the
19 APMC Presentation”) which is found at:

20 http://prezi.com/b_f7djco81ri/copy-of-themanako123/.

21 5. Because the APMC Presentation differs significantly from the
22 explanation of the relationship of the plaintiff to the investigators provided by

1 plaintiff in response to Request for Production No. 15, and because the APMC
2 Presentation indicates that APMC is not only the investigator, but the source of
3 funding and of the strategy and pleadings in this matter, and because the APMC
4 Presentation expressly references plaintiff's identified witness Mr. Macek, I
5 prepared the three targeted Requests for Production about APMC that are the
6 subject of this Motion to Compel.

7 6. My April 21, 2014, email to plaintiff's counsel forewarned her about
8 the three new requests for production. I specifically addressed the APMC
9 Presentation and how it leads to the conclusion there could be no privilege for
10 APMC correspondence. I requested counsel for plaintiff to provide an explanation
11 of privilege if there could be one. A copy of this email redacted to eliminate
12 confidential material is attached as Exhibit B.

13 7. I wrote once more on the subject on April 22, 2014, serving the
14 discovery and explaining why the requested material could not be privileged. We
15 invited a dialogue on it, telling counsel we assumed her silence to indicate
16 concurrence with our presumptions. A copy of this email redacted to eliminate
17 confidential material is attached as Exhibit C.

18 8. Plaintiff's counsel responded to me the next day on April 23, 2014,
19 refusing to address the issue of privilege and then foreshadowing the failure to
20 produce discovery we predicted would come. Here is a quote from her April 23,
21 2014 email on the point:

22

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1 Please understand further that I am not at your beck and call and will
2 respond to communications from your office as my calendar and other
obligations permit.

3 With respect to additional discovery, the way this process works is
4 that you should serve discovery requests pursuant to the Federal Rules
5 of Civil Procedure and we will respond in a timely manner. To the
6 extent that you seek material that is not subject to discovery, please
7 expect us to file our objections. Any issues that cannot be resolved by
counsel will proceed to Judge Rice. You can, of course, continue to
try to circumvent this process but you will not succeed. We will
respond to your second request for production in the ordinary course
and following this process.

8
9 9. Then, as predicted, no documents were produced. Additionally,
10 although plaintiff's counsel indicated she would "respond in a timely manner" the
11 "responses" were not received until May 30, 2014. If plaintiff desired a sincere
12 discussion about the merits of its objections, it could have served the objections
13 upon receipt of the discovery, but plaintiff chose to wait until past the last minute,
again attempting to avoid an obligation to shine light on its cloaked investigators.

14
15 10. I noticed that the discovery responses received on May 30, 2014, bore
16 the May 28, 2014, postmark and that this was not consistent with the May 22,
17 2014, Certificate of Service. I knew from my experience that failure to timely
18 serve discovery is a waiver of objections in the Federal system, so I knew this
discrepancy was substantively important.

19
20 11. Consequently, on the date of receipt of these documents, I wrote to
21 counsel for plaintiff and offered her an opportunity to correct the Certificate of
22 Service, which seemed as if it must be in error, since causing something to be

1 served on May 22 would not result in a postmark of May 28. This email is attached
2 as Exhibit D.

3 12. Counsel for plaintiff replied on May 30, 2014, and provided some
4 hearsay that her assistant mailed the document as instructed on May 22, 2014, and
5 that the fault must lie with the post office. This email is attached as Exhibit E.

6 13. This explanation did not persuade me that the service was completed
7 on May 22. I checked other discovery mailed by plaintiff's counsel to my law firm.
8 My firm "copy receive stamps" incoming pleadings so I compared other pleadings
9 from plaintiff's counsel and found that none of them had an eight day delay from
10 the stated Certificate of Service to the delivery date. I also checked and discovered
11 that other discovery served by plaintiff had been simultaneously mailed and
12 emailed to my firm with a Certificate of Service showing both methods of service,
13 but this Second Set of Requests for Production had not been simultaneously
14 emailed as it was mailed; in fact, it had not been emailed at all. This made me more
15 suspicious that counsel for plaintiff might have wished that the responses were sent
16 on May 22, but likely they were not. It occurred to me that one way to reconcile
17 the discrepancy would be for the assistant that was the subject of the May 30
18 hearsay explanation to provide his or her own declaration as to the events of
19 May 22, so that the real circumstances of the service could be determined. I
20 responded on that same day, May 30, pointing out the concerns we had with
21 counsel's curt explanation that the fault lied with the post office. I noted the normal
22 time to obtain mail from her offices was not eight days, and I noted that this

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1 discovery was not simultaneously emailed as other discovery had been. I requested
2 that a sworn Declaration from the un-named assistant would go a long way toward
3 us accepting the explanation as the truth. This email is attached at Exhibit F.

4 14. I assumed that the un-named assistant would either (i) be quite willing
5 to provide a detailed declaration (assuming the document was actually served on
6 May 22), or (ii) that the request would force the issue and expose that perhaps it
7 was not actually served on May 22, and the assistant would not be willing to
8 provide a detailed declaration to support Ms. VanderMay's purported May 22
9 Certificate of Service.

10 15. If the document had actually been served on May 22, then I expected
11 a declaration that included recollection of the attorney signing the document on
12 that date, the envelope being prepared and stamped on that date, some explanation
13 of how the firm's mail service worked, whether it was picked up by USPS or
14 dropped off at USPS, and at what time. I assumed if it had actually been served on
15 May 22 that this declaration would talk about the fate of other mail sent at the
16 same time from this firm – i.e. presumably, if this document took six days to get a
17 postmark, then others did too. In other words, I assumed there might be an
18 explanation of what other mail from the VanderMay firm from May 22, 2014, met
19 the same fate. Or if the fault were with a particular box or office, maybe there
20 would have been other users of the same USPS box or office that experienced the
21 fate of this six day delay. A six day delay in the mail could affect many people and
22 important matters such as bills and contracts and rent and the like and might even

1 be local news in Salem. But no such declaration of the un-named assistant was
2 provided.

3 16. On Monday, June 2, 2014, I received a telephone call from Carl
4 Crowell, who stated he was “non-appearing” counsel for Elf-Man, LLC. I spoke
5 with Mr. Crowell for 44 minutes. He told me that Ms. VanderMay was going to
6 withdraw from the matter and that he would attend to the urgent issues which he
7 asked me to identify for him. I identified the postmark discrepancy as one of the
8 urgent issues. I identified that a Declaration of the person who actually served the
9 document would be helpful in resolving the substantive discrepancy. Mr. Crowell
10 wrote me an email after the call on June 2, 2014, and asked for a copy of my letter
11 to counsel about the postmark issue “and I will see that it is addressed.”

12 17. On that same June 2, 2014, I replied to Mr. Crowell and provided my
13 correspondence with Ms. VanderMay on the postmark issue as he requested. A
14 copy of this email redacted to eliminate confidential material is attached as Exhibit
15 G. This email explained the substantive importance of the Certificate of Service
16 issue and demanded the discovery or the privilege logs:

17 The APMC discovery is important. Please review the “prezi”
18 presentation of Mr. Gerephil Molina of APMC Cebu about which we
19 became aware after counsel gave us the implausible explanation under
20 RFP #15. This 700 page expose seems to explain the back office of
21 these matters -- APMC doing the uploading, preparing the pleadings,
22 doing the discovery, all from Germany or the Philippines. None of
this can be privileged as plaintiff claims. And the May 22 Declaration
of Service vs the May 28 postmark is critical on this point. If the
objections are waived, then we expect the documents immediately. If
the objections are not waived, then we expect the privilege log

1 immediately and our first order of business will be our required LR 37
2 conference on the production.

3 Mr. Crowell has not again contacted me about the Elf-Man case to provide
4 any explanation of the postmark or to discuss production of the documents or the
5 privilege log. No Declaration of Ms. VanderMay's assistant has been provided.

6 18. Even though I had written to Mr. Crowell on June 2, 2014, Ms.
7 VanderMay replied to me on June 3, 2014:

8 Our office practice for outgoing mail is as follows: mail that is ready
9 by the time of our postal delivery is given to our mail carrier and mail
10 that is ready later in the day is taken to a mailbox by one of our office
11 staff. The location of the box varies depending upon what other
12 delivery assignments the staff person has on a particular day.

13 No declaration of the un-named assistant was provided, and no details about
14 the events (or non-events) of May 22 were provided, like what mailbox was used
15 and what other mail met the similar fate. The requested privilege log was also not
16 provided.

17 19. On that same date, June 3, 2014, Ms. VanderMay filed her Motion to
18 Withdraw citing ethical differences with "plaintiff's representatives." ECF No. 55
19 at page 2. Note that the identical language is used in the Motion to Withdraw in
20 The Thompsons Film case, Case No. 2:13-cv-00126-TOR, ECF No. 103 at page 2,
21 a case with an entirely different plaintiff. Who are these "plaintiff's
22 representatives" with whom plaintiff's counsel has its ethical differences? How
could any new lawyer take the case and not suffer the same ethical issues?

1 20. I remain unconvinced that the responses were served on May 22,
2 2014, despite Ms. VanderMay's Certificate of Service to the contrary.

3 21. Today, June 13, 2014, I spoke with attorney David Lowe of Seattle
4 who told me he may become attorney for Elf-Man, LLC in this case. We spoke for
5 66 minutes. Mr. Lowe told me that the deposition of Mr. Lamberson scheduled for
6 Thursday, June 19 would not happen because he could not make it. He also told me
7 that the Fed. R. Civ. P. 30(b)(6) Deposition of Elf-Man, LLC would not happen on
8 Friday, June 20, 2014, because Elf-Man, LLC could not make it. A copy of the
9 30(b)(6) Notice is attached as Exhibit H.

10 22. I told Mr. Lowe it was no surprise that Elf-Man, LLC would not
11 attend the noted 30(b)(6) deposition, and it was no surprise that plaintiff never
12 noted Mr. Lamberson's deposition for the agreed June 19, 2014 date. It is no
13 surprise because plaintiff has no real desire to participate in the merits of this
14 matter, they are just pretending they wish to depose Mr. Lamberson and inspect his
15 machine. This case was filed more than 14 months ago. There has been no sincere
16 effort to take Mr. Lamberson's deposition, just a transparent request by plaintiff for
17 a "discovery plan" to stop defendant from discovery while plaintiff pretends to
18 want to take Mr. Lamberson's deposition. Recall the May 9, 2014, Discovery
19 Conference Ms. VanderMay initiated with the Court wherein plaintiff requested
20 that all discovery be stayed until plaintiff could depose Mr. Lamberson and inspect
21 his machine. Defendant submitted an *in camera* letter dated May 8, 2014,
22 explaining that Mr. Lamberson's employer required him to request time off work

1 in advance, but that we had done that and had offered several days for deposition,
2 and that the parties had agreed to Thursday, June 19, 2014. Mr. Smith of my firm
3 explained this to the Court in that May 9, 2014 hearing, expressly mentioning the
4 Fed. R. Civ. P. 30(b)(6) deposition of Elf-Man, LLC for the next date. Recall that
5 the Court denied the request to allow only plaintiff's discovery to go forward, and
6 the Court acknowledged that taking the 30(b)(6) at the same time made sense. Now
7 that plaintiff's "discovery plan" request has been denied by the court, it is no
8 surprise that plaintiff has fallen silent on its representations that efficient
9 administration of justice demands a prompt deposition of Mr. Lamberson. It is no
10 surprise that Mr. Lowe has represented to me that Elf-Man, LLC will not appear
11 for the noted deposition next Friday.

12 23. It appears plaintiff has an intractable problem: it has representatives
13 that are apparently trying to force plaintiff's counsel into actions the counsel
14 cannot undertake in good faith. Plaintiff has repeatedly failed to allow discovery
15 of the basic facts of the case, and I cannot imagine how these representatives will
16 ever "allow" such discovery in this "severed" case when there are lawsuits against
17 hundreds of people in our state alone based on the same inadmissible evidence of
18 an imperceptible bit harvested by an unlicensed investigator in another country
19 from an IP address but with no corroboration that any identifiable person sent the
20 imperceptible bit. For example, even if the Court were to grant our pending Motion
21 to Compel the deposition of the German investigators in Spokane, ECF No. 50, we
22 sincerely doubt the "plaintiff's representatives" would be cooperative about

1 compliance with the Order, given the reluctance to date to comply with discovery
2 requests and the Court's Order, ECF No. 31, to explain the relationship with the
3 investigators. On behalf of Mr. Lamberson, we respectfully request that the Court
4 Order plaintiff to comply with discovery, award costs and attorneys fees. We also
5 respectfully request that plaintiff's case be dismissed with prejudice, and that Mr.
6 Lamberson be declared the prevailing party such that he can pursue costs,
7 attorney's fees and monetary sanctions under 17 U.S.C. §505, 28 U.S.C. §1927,
8 and Fed. R. Civ. P. 11.

9 I declare under penalty of perjury under the laws of the United States that
10 the foregoing is true and correct.

11
12 DATED this 13th day of June, 2014, in Spokane, Washington.

13 LEE & HAYES, PLLC

14
15 By: s/ J. Christopher Lynch

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Email: chris@leehayes.com

19 *Counsel for Defendant Ryan Lamberson*
20
21
22

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2014, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Maureen C. VanderMay

efile@vandermaylawfirm.com

LEE & HAYES, PLLC

By: s/ J. Christopher Lynch

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